Supreme Court, U.S.
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No. 01-359

IN THE

Supreme Court of the United States

LORI A. SAFRIT,

Petitioner,

v.

CONE MILLS CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

JAMES M. POWELL
D. ROSS HAMILTON, JR.*
HAYNSWORTH BALDWIN JOHNSON & GREAVES LLC
Attorneys for Respondent
P.O. Box 13310
Greensboro, NC 27415-3310
(336) 375-9737

* *Counsel of Record*

169668

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

Can a plaintiff proceed to federal court on a Title VII claim of gender discrimination in the face of a governing collective bargaining agreement that clearly binds her claim to arbitration?

LIST OF INTERESTED PARTIES

The parties and counsel of record are properly identified in the caption. Cone Mills Corporation is a publicly held company. It does not have a separate parent company, and no publicly held company owns ten percent or more of its stock.

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STATEMENT OF THE CASE

I. Former Collective Bargaining Agreement

Petitioner was employed by Cone Mills Corporation, [hereinafter "Cone Mills"], at its manufacturing plant in Salisbury, North Carolina. Petitioner was a dues paying member of the United Needletrades, Industrial and Textile Employees Union [f/k/a Amalgamated Clothing and Textile Workers Union], and Local 1584, [hereinafter collectively referred to as the "Union"], which represented her in a bargaining unit of approximately 500 Salisbury plant employees. Cone Mills and the Union had negotiated a collective bargaining agreement, (hereinafter "Agreement"), which was in force for all relevant time periods of Petitioner's allegations.

The Agreement clearly identifies Petitioner's claim of gender discrimination in violation of Title VII as one of the specific grievances that the parties agree to arbitrate. First, Section III of the Agreement states that all disputes arising under the Agreement will be handled pursuant to the grievance steps outlined in that section. Second, Cone Mills and the Union expressly agree in Sections III and IV to arbitrate "only those grievances involving issues specifically mentioned as being arbitrable in the succeeding sections of the Agreement." Sections III and IV state in pertinent part:

SECTION III – ADJUSTMENT OF GRIEVANCES

> Grievances arising out of the operation of this Agreement will be handled in the following manner:
>
> . . .

(d) Upon receipt, in writing, of the Manager's decision at the fourth (4th) step of the grievance procedure, the Union shall have ten (10) calendar days to submit the matter to arbitration in accordance with the terms of Section IV – Arbitration, of this Agreement. . . .

(e) A grievance involving specific issues as expressly stated in various sections of this Agreement may be submitted to arbitration as provided in Section IV if it has not been satisfactorily settled in the final grievance conference. Only those grievances involving issues specifically mentioned as being arbitrable in the succeeding sections of the Agreement may be arbitrated. . . .

SECTION IV – ARBITRATION

(a) Any grievance which remains unsettled after having been fully processed pursuant to the provisions of Section III, and which involves a dispute subject to arbitration under this Agreement, . . . , may be submitted to arbitration upon the written request of the Union . . .

(c) The award of an arbitrator so selected upon any dispute subject to arbitration as herein provided shall be final and binding upon all parties to this Agreement, and upon the aggrieved employee or employees. . . .

Twenty-two sections of the Agreement follow the arbitration provision in Section IV, and Cone Mills and the Union specifically express their intent to arbitrate unresolved

grievances arising under all or part of twelve sections of the Agreement. When the parties intended to arbitrate all disputes arising under a particular section of the Agreement, the Agreement provided: "Arbitration. Unresolved grievances arising under this Section are the proper subjects for arbitration." If the parties intended to limit the types of disputes in a particular section that is subject to arbitration, the Agreement properly described the grievances which "are proper subjects for arbitration."

Section XX of the Agreement specifically identifies a claim of gender discrimination in violation of Title VII as a grievance that must be submitted to arbitration. This section of the Agreement prohibits gender discrimination and requires the Company's compliance with all requirements of Title VII. Further, Cone Mills and the Union expressly identify any unresolved grievance arising under this Section XX as one of the specific disputes that must be resolved through final and binding arbitration under Section IV.

SECTION XX – NON-DISCRIMINATION

> The Company and Union agree that they will not discriminate against any employee with regard to race, color, religion, age, sex, national origin or disability. This includes but is not limited to, all phases of employment, benefits, hiring, placement, rates of pay, upgrading, transfer, layoff, demotion, and termination. The parties further agreed that they will abide by all the requirements of Title VII of the Civil Rights Act of 1964 and Executive Orders 11246 and 11375.
>
> Arbitration. Unresolved grievances arising under this Section are the proper subjects for arbitration.

II. Petitioner's Gender Discrimination Allegations and Grievance

In November 1994, Petitioner was awarded a Sulzer Fixer Trainee position through the job bidding process. (Pet. Aff. ¶ 2)[1] Petitioner complains that during her training period for the fixer position, she was denied sufficient training for the job and that the Company hired a male for a fixer position rather than offer her the position. (Pet. Aff. ¶¶ 5-9) Petitioner discussed the alleged discrimination with the President of the Local Union, Cindy Chattin, and that based upon Chattin's advice, Petitioner initiated a grievance in June 1995 alleging that she was denied training opportunities equal to her male co-workers. (Pet. Aff. ¶¶ 12-13) (Company Joint Affidavit, ¶ 6)[2]

Petitioner's grievance was reduced to writing by the union shop committee on June 16, 1995, as Grievance No. 18/95 signed by Ms. Chattin, and asked that the Company stop discriminating against Petitioner. (Co. Aff. ¶ 6, Ex. B) At the fourth step of the grievance procedure, Cone Mills agreed to provide Petitioner with additional training time beyond the normal six month period so that she could become a qualified fixer. (Pet. Aff. ¶ 14) (Co. Aff. ¶ 6) The offer to extend Petitioner's training period settled the grievance as it was not pursued through arbitration. (Co. Aff ¶ 6)

Petitioner was informed on or about October 4, 1995 that she would be transferred to an off-shift to complete her training and fill a vacant fixer position. (Pet. Aff. ¶¶ 17, 20)

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1. Petitioner's Affidavit hereinafter abbreviated "Pet. Aff."

2. Company Joint Affidavit is hereinafter abbreviated "Co. Aff."

(Co. Aff. ¶ 7) At a meeting attended by Ms. Chattin and a union shop steward on October 16, 1995, Petitioner informed the Company that she would remove herself from the training program rather than change shifts. (Co. Aff. ¶ 7) (Pet. Aff. ¶ 20) Petitioner was then removed from the training program and placed in another job. (Co. Aff. ¶ 7) Petitioner and a union representative did not initiate a grievance over the circumstances leading up to her removal from the training program. (Co. Aff. ¶ 8) Petitioner filed a charge of discrimination with the EEOC on October 5, 1995. (Pet. Aff., Ex.) At the time she filed this suit on June 16, 1997, Petitioner was still employed at Cone Mills' Salisbury plant. The plant has since closed.

There is no allegation that the Union ever refused a request by Petitioner that it pursue a gender discrimination grievance on her behalf. As stated above, the Union did pursue a gender discrimination grievance on her behalf when requested by Petitioner in June, 1995. Furthermore, there is no allegation that the Union even dissuaded her from seeking to initiate a second grievance, or that the Union even advised her to file suit as opposed to a second grievance at the time she declined to change shifts and was removed from the fixer training program. Instead, Petitioner states in her affidavit that she informed Chattin at that point of *her own* decision to file a complaint with the Equal Employment Opportunity Commission, and that Chattin "concurred" with Petitioner's decision. (Pet. Aff. ¶¶ 22-23) [3] When the EEOC investigation

3. The existence of an agreement to arbitrate a Title VII claim does not preclude the EEOC investigation of a discrimination charge and pursuit in court of equitable remedies on behalf of a charging party. *EEOC v. Waffle House*, 193 F.3d 805 (4th Cir. 1999), *petition for writ of certiorari granted*, 149 L. Ed. 2d 344, 121 S. Ct. 1401 (2001).

showed little progress, Petitioner states that Chattin then referred her to an attorney. (Pet. Aff. ¶ 24) Petitioner complains that Chattin did not advise her at that point to re-submit the matter by grievance, (Pet. Aff. ¶ 25), but at this point the time frame for initiating a grievance under Section III would necessarily have expired.[4]

REASONS FOR DENYING THE WRIT

I. PETITIONER'S PETITION ARGUES THAT THE FOURTH CIRCUIT INCORRECTLY INTERPRETED THE AGREEMENT TO REQUIRE ARBITRATION OF PETITIONER'S CLAIM. THIS CLAIM OF CONTRACT INTERPRETATION ERROR WAS NOT RAISED BELOW, DOES NOT REQUIRE SUPREME COURT CLARIFICATION, AND SUGGESTS THIS IS NOT THE PROPER CASE FOR REVIEW OF THE QUESTION PRESENTED.

While conceding that the Agreement incorporates all of Title VII's requirements, Petitioner for the first time states in her petition that the Agreement "permits", but does not "require" either explicitly or at all, arbitration of her Title VII claim, and that the Fourth Circuit misinterpreted the Agreement to compel arbitration of her claim. (Pet. Petition p. 15) To the extent that the lower courts misinterpreted the provisions of the Agreement as Petitioner now asserts, (which Cone Mills disputes), Petitioner's argument suggests that this is not an appropriate case for resolving the conflict in the decisions among the circuit courts as stated in the Question Presented in the Petition for a Writ of Certiorari.

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4. Section III of the Agreement places a ten day time limit for the employee to initiate a grievance.

At no time throughout the lower court proceedings did Petitioner assert that the Agreement could be properly read to "permit" but not "require" arbitration of her Title VII claim.[5] Because this argument was not raised by Petitioner in the lower courts, it is not grounds for review. *Youakim v. Miller*, 425 U.S. 231, 234 (1976); *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970) ("Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them."); *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 362 (1981) (question presented in petition but not in the court of appeals is not properly before us).

Furthermore, Petitioner's claim of contract interpretation error is not a previously unresolved issue that requires the review and guidance of this Court. Petitioner erroneously claims that further guidance from this Court is necessary to establish the boundaries of a "particularly clear" waiver under *Wright v. Universal Maritime Service Corporation*, 525 U.S. 70 (1998). (Pet. Petition p. 15) To the contrary, *Wright* referred to several prior decisions of the Court which define the "clear and unmistakable" standard for analyzing the text of a collective bargaining agreement. *Id.*, at 79-80; citing:

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5. The arguments raised by Petitioner to the district court are summarized in the district court memorandum opinion. (Pet. Petition App. pp. 9a-10a). In her brief to the Fourth Circuit, Petitioner argued that a clear and unmistakable agreement did not exist because the individual employee did not understand and was not informed of the waiver, because the individual employee had no control over the decision to pursue arbitration and because the potential remedies were limited. Petitioner also argued that her good faith attempts to pursue the grievance process made it inappropriate to deny her a federal forum. The Fourth Circuit rejected these arguments on the basis of its precedent discussed *infra*. (Pet. Petition App. p. 4a)

Metropolitan Edison Co. v. NLRB, 460 U.S. 693, 707-710 (1983) (waivers of a statutory right can occur if expressed clearly and unmistakably within the contract's provisions); *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 279-284 (1956) (the contract as a whole should be examined when determining whether the agreement has expressly waived a statutory right) (additional citations omitted). Petitioner's argument is nothing more than the Fourth Circuit erred by focusing only on the language of Section XX and failing to look at the Agreement as a whole. Apparently, Petitioner argues that had the Agreement been construed as a whole, the Court would have found that arbitration is permissive not mandatory. The petition should not be granted for the purposes of determining if the Fourth Circuit correctly interpreted the Agreement.

Finally, Petitioner's contention that the Agreement permits, but does not require, arbitration of her Title VII claim suggests that this is not a proper case for the Court to decide the issue left undecided in *Wright*. In *Wright*, the Court left unresolved the question of the validity of union negotiated agreement to arbitrate statutory claims, because there was no clear and unmistakable agreement to arbitrate the discrimination claim in that case. *Wright*, 525 U.S. at 77. If, as the petition suggests, the Agreement does not contain a clear agreement to arbitrate, the Court will once again not reach the question left undecided in *Wright*. In these circumstances, a grant of the petition will not resolve the split among the circuits identified by Petitioner and should, therefore, be denied.

II. THE FOURTH CIRCUIT HAS ADOPTED A VERY NARROW AND EXPLICIT RULE FOR THE ENFORCEMENT OF COLLECTIVELY BARGAINED AGREEMENTS TO ARBITRATE STATUTORY DISCRIMINATION CLAIMS.

In the wake the Court's decision in *Wright*, *supra*, the Fourth Circuit has identified two narrow means for the parties to a collective bargaining agreement to draft express language that satisfies the clear and unmistakable standard and creates an enforceable agreement to arbitrate a statutory discrimination claim. The union and the employer can draft an arbitration clause that explicitly agrees to submit to arbitration all federal causes of action arising out of the employment relationship. *Carson v. Giant Food, Inc.*, 175 F.3d 325, 331-32 (4th Cir. 1999). Only an arbitration clause that is drafted with this particular clarity will suffice to bind Title VII claims to arbitration. *Id.* at 332. Alternatively, the union and the employer must explicitly incorporate the statutory anti-discrimination requirements into their collective bargaining agreement, coupled with a provision to arbitrate all disputes arising under the agreement. *Id.* A contract provision that merely expresses an agreement not to violate federal antidiscrimination law is inadequate, even if the provision identifies the discrimination statute by name. *Brown v. ABF Freight Systems, Inc.*, 183 F.3d 319, 322 (4th Cir. 1999). Instead, the language of the contract must be drafted in such a manner that it incorporates, "*in toto*, the anti-discrimination statutes that prohibit those acts." *Id.*

As a result and contrary to Petitioner's petition, unions and employers are not "uncertain as to the legal significance of the countless collective bargaining agreements negotiated

each year." (Pet. Petition p. 16) Only the unique and rare collective bargaining agreement drafted with an arbitration clause that explicitly agrees to arbitrate statutory discrimination claims or in a manner that incorporates the discrimination statute, *in toto*, will contain a binding arbitration agreement in the Fourth Circuit. It is clear that run of the mill agreements to submit all disputes to grievance and arbitration coupled with an agreement to abide by the discrimination laws will not require arbitration of a statutory discrimination claim. Furthermore, under the Fourth Circuit's standards, the parties negotiating a collective bargaining agreement will not stumble into an enforceable agreement to arbitrate statutory discrimination claims. Instead, they can be certain that they are not forming a binding agreement to arbitrate unless they agree to follow the narrow means and draft the very explicit language required by *Carson*, *supra* and *Brown*, *supra*.

There is no uncertainty between Cone Mills and the Union regarding their intent to provide for a mechanism for the grievance and arbitration of Petitioner's gender discrimination claims. The Union filed a grievance on her behalf alleging gender discrimination as prohibited in Section XX of the Agreement, and successfully negotiated at the fourth step of the grievance procedure a resolution of her grievance that gave her more time to complete the training program. Furthermore, there is no allegation that the Union ever refused or even dissuaded Petitioner from initiating another discrimination grievance. In the petition, Petitioner contends that this case is just like *Wright*, in that the Fourth Circuit gave the contract a meaning the Union never intended. In *Wright*, there was evidence presented that the union never intended for plaintiff's disability claim to be subject to arbitration. In this case, however, there is no such evidence

presented by or on behalf of the Union. In fact, the explicit language of the Agreement and the conduct of the parties with regard to Petitioner's June 1995 discrimination grievance demonstrate otherwise.

Therefore, in light of the very narrow and explicit requirements of the Fourth Circuit for drafting an enforceable agreement to arbitrate statutory discrimination claims, this case does not present an unresolved issue whose uncertainty undermines the integrity of the collective bargaining process as claimed in Petitioner's petition. To the contrary, the Fourth Circuit has explicitly stated a very narrow rule for the enforcement of agreements to arbitrate statutory discrimination claims that will only be met if the parties chose to do so.

CONCLUSION

For the reasons stated, the petition for a writ or certiorari should be denied.

Respectfully submitted,

JAMES M. POWELL
D. ROSS HAMILTON, JR.*
HAYNSWORTH BALDWIN JOHNSON
& GREAVES LLC
Attorneys for Respondent
P.O. Box 13310
Greensboro, NC 27415-3310
(336) 375-9737

* *Counsel of Record*